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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF IDAHO

KIMBERLEY SMITH, MICHAEL B. HINCKLEY, JACQUELINE T. HLADUN, MARILYN J. CRAIG, JEFFERY P. CLEVENGER, and TIMOTHY C. KAUFMANN, individually and on behalf of those similarly situated,

Plaintiffs,

vs.

MICRON ELECTRONICS, INC., a Minnesota corporation,

Defendant.

Case No. CIV 01-0244-S-BLW

MEMORANDUM IN SUPPORT OF MICRON ELECTRONICS, INC.'S MOTION FOR PARTIAL SUMMARY JUDGMENT RE PLAINTIFFS' CLAIMS OF ALTERING EMPLOYEES' TIMECARDS

ORIGINAL

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Defendant Micron Electronics, Inc. ("MEI"), by and through its counsel, hereby submits this Memorandum in support of its motion for partial summary judgment regarding Plaintiffs' allegations that MEI supervisors or managers altered or changed timecards for the purpose of illegally diminishing time recorded by Plaintiffs and claimants.

I. INTRODUCTION

One of the grounds upon which Plaintiffs and eligible, conditionally certified claimants (collectively, "Plaintiffs") assert a Fair Labor Standards Act (the "FLSA") claim is predicated on an allegation that MEI

> implicitly and explicitly allowed managers to alter employee timecards" and "alter[ed] employee time records to avoid payment of wages earned.

(Second Amended Complaint and Demand for Jury Trial ("Second Amended Complaint") (Docket No. 94) ¶¶ 2, 3.) Plaintiffs claim that MEI's alterations caused Plaintiffs to lose overtime pay that they would otherwise have received. (*Id.*)

Notwithstanding MEI's extensive discovery (including requests for admissions, requests for production, interrogatories and 34 depositions), Plaintiffs have provided absolutely no evidence or proof to support their timecard alteration claim. Plaintiffs' bare accusations, unsupported by any factual detail or record evidence, are insufficient to survive summary judgment.

Contrary to Plaintiffs' alteration claim, inside sales representatives, including many claimants, admit that they have no knowledge of timecard alterations. Moreover, MEI's supervisors and managers signed, under oath, statements that they never altered timecards in order to reduce overtime compensation.

MEI has also offered physical evidence showing a proper timecard alteration reflecting when an employee was absent from work. This alteration was not only permissible, but required under the FLSA. This evidence is not refuted. Plaintiffs simply have nothing in the record to support their serious allegations.

Therefore, any claims in the Second Amended Complaint that relate to alleged illegal alteration of timecards should be dismissed on partial summary judgment.

II. PROCEDURAL BACKGROUND

This lawsuit was originally filed on June 1, 2001 on behalf of Kimberley Smith, named individually and as a representative in an attempt to certify the suit as a collective action under section 16(b) of the FLSA. (*See* Complaint and Demand for Jury Trial (Docket No. 1).) Ms. Smith later amended her complaint on June 8, 2001 (*see* Amended Complaint and Demand for Jury Trial (Docket No. 6)) and filed a Second Amended Complaint on April 23, 2002 (*see* Second Amended Complaint). As a result of these amendments, there are now six individually named Plaintiffs. (*See* Second Amended Complaint.)

Before Plaintiffs took steps toward conditional class certification, forty-three claimants opted to join the class. After the Court granted conditional certification (Docket No. 155) and several rounds of notices were sent, the current total number of Plaintiffs and opt-in claimants is 91, although there is a separate motion pending to dismiss 21 claimants[1] and a separate motion

[1] Motion to Strike Consents and Dismiss Claimants, filed June 14, 2004 (Docket No. 189).

for partial summary judgment that, if granted, would result in the dismissal of additional claimants.[2]

III. FACTUAL BACKGROUND

A. MEI's Policies

1. Timekeeping Policy

Each of the sales subsidiaries had a timekeeping and overtime policy. The timekeeping policy specifically required employees to maintain accurate time records, including time taken off for personal reasons. (*See* Statement of Undisputed Facts in Support of MEI's Motion for Partial Summary Judgment re Plaintiffs' Claims of Altering Employees' Timecards ("SOF") ¶ 4.)

Additionally, employees were responsible for reviewing their own timecards to ensure that the record accurately reflected the actual number of hours the employee worked. (*Id.*) Supervisors were responsible for reviewing and approving employee time records. (*Id.*) The manual expressly prohibited any falsification of time records. (*Id.*)

2. MEI's Timekeeping Program

To allow employees to comply with the timekeeping and overtime policies, MEI used a computer-generated timekeeping program. (SOF ¶¶ 1-3.) From June 1998 to May 2001, there

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[2] Motion for Partial Summary Judgment Re Statutes of Limitation (Docket No. 193). Under a 2-year statute of limitation for the FLSA claims, 20 claimants must be dismissed from this lawsuit and the remaining claims are limited in temporal scope. If a 3-year statute of limitations was applied to the FLSA claims (although MEI expressly contends that only a 2-year statute applies in this case), then 10 claimants would be dismissed from this lawsuit and the remaining claims would be limited in temporal status. *See* Memorandum in Support of Motion for Partial Summary Judgment Re Statutes of Limitation (Docket No. 195), pp. 11-12.

were two different systems for keeping track of time for hourly employees: the VAX system and the Me@micronpc.com system. (SOF. ¶ 1.)

Under the VAX system, an employee accessed a time sheet program in which he or she entered the total daily hours worked. (*Id.*) The VAX system was designed to "allow[] team members and supervisors to enter time worked, approve hours entered, and request approval for hours entered." (SOF ¶ 2.) The VAX system was used to track the *actual number of hours* an inside sales representative *actually worked* in a workweek. (*Id.*)

The Me@micronpc.com system was implemented in approximately January 2000. (SOF ¶ 3.) It tracked an employee's *actual work* time by requiring the employee to input the starting time of each day, the total time away from one's desk for any breaks or lunch time and then the ending time of each day. (*Id.*) The Me@micronpc.com system would then automatically calculate the total time worked for the day. (*Id.*)

Occasionally, supervisors had to correct the timecards generated by the Me@micronpc.com system when employees were absent and not able to change their timecards.[3]

B. Background of Plaintiffs' Alleged Alterations

The six named Plaintiffs purport to be similarly situated as, and appropriately representative of, the class of inside sales representatives who were employed by MEI or its

[3] For example, on one particular occasion when Ms. Smith was absent from work, her supervisor Jaime Nava corrected her timecard after the fact by submitting a timecard modification form. (*See* SOF ¶ 11.) Mr. Nava's adjustment gave Ms. Smith 24 hours of bereavement leave. (*Id.*) However disgruntled Ms. Smith may have been with having her timecard corrected, the change did nothing more than reflect the *actual* time Ms. Smith worked.

subsidiaries for the period from June 1, 1998 to May 31, 2001. (Second Amended Complaint ¶ 49 at 15.) The Second Amended Complaint alleges that these six individuals will present questions of law and fact common to the proposed class and that the claims of Plaintiffs as representative parties are typical of the claims of the proposed class. (*See, e.g., id.* at 1 & ¶¶ 11-29.)

Notwithstanding the purportedly representative nature of these Plaintiffs and their classwide allegations of timecard alterations, the facts reveal that:

(1) the representatives' allegations are not typical of the class;

(2) those who claim their timecards were altered have no factual data or evidentiary proof of timecard alterations; and

(3) timecard alterations simply did not occur on a classwide basis. (*See* SOF ¶¶ 6-11.)[4]

A review of each of the six named Plaintiffs demonstrates that even these individuals do not have any legally cognizable claims for improper alteration of time records. Consequently, Plaintiffs (and claimants) cannot pursue any claims that focus on this area.

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[4] Plaintiffs' conclusory allegations in their Second Amended Complaint (Docket No. 94), Statement of Material Facts (Docket No. 77) and Brief in Support of Motion for Conditional Certification (Docket No. 76) will not create an issue of material fact sufficient to survive summary judgment. *See Nieves v. Univ. of P.R.*, 7 F.3d 270, 276 n.9 (1st Cir. 1993) ("Factual assertions by counsel in motion papers, memoranda, briefs, or other such 'self-serving' documents, are generally insufficient to establish the existence of a genuine issue of material fact at summary judgment."); *see also Rountree v. Fairfax County Sch. Bd.*, 933 F.2d 219, 223 (4th Cir. 1991) ("The arguments of counsel, absent any evidence such as sworn affidavits accompanying objections to a motion for summary judgment, fail to meet the evidentiary standard necessary to create a genuine issue of material fact." (citing *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986))).

1. **Kimberley Smith**

Ms. Smith attested that "[o]ne [*sic*] Two [*sic*] occasions I determined that my supervisor, Jaime Nava, altered my Timesheet [*sic*] without my prior knowledge or consent. I confronted Mr [*sic*] Nava and he admitted the [*sic*] reducing my hours and said that as my supervisor he was entitled to adjust my timesheet as he saw appropriate." (Affidavit of William H. Thomas ("Thomas Aff.") (Docket No. 78) Ex. 13 (Affidavit of Kimberley Smith ("Smith Aff.") ¶ 12).)

Ms. Smith provided neither facts nor evidence showing that any alterations were unlawful. Rather, Ms. Smith testified that she cannot remember any specific dates when the alleged alteration occurred. (Second Affidavit of Gregory C. Tollefson ("2nd Tollefson Aff.") (Docket No. 124) Ex. M (Smith Depo. at 408:23-409:8).) Ms. Smith cannot recall any specifics regarding the timecard change and admits that her supervisor may have changed her time to reflect Ms. Smith's tardy arrival to work. (*Id.* at 410:24-411:13.) Indeed, Ms. Smith also admits that her supervisor's alterations may have given her more overtime, rather than less. (*Id.* at 411:14-21.)[5]

[5] MEI has provided documentary proof that Ms. Smith's supervisor, Mr. Nava, submitted a timecard modification form to correct her timecard to reflect the time that Ms. Smith *actually* worked. (SOF ¶ 11; Affidavit of Jaime Nava (Docket No. 117) ¶ 11 and Ex. A.) Ms. Smith was absent from work to attend a funeral. (*Id.*) To correct Ms. Smith's timecard to actually reflect the number of hours that she worked, Mr. Nava had to submit a timecard modification. (*Id.*) In fact, Mr. Nava added 24 hours to Ms. Smith's timecard for bereavement leave. (*Id.*) As will be discussed in Section V.D. below, MEI is required under the FLSA to make corrections to reflect the actual time worked by an employee, and the modification in no way amounts to a FLSA violation.

2. Michael B. Hinckley

Michael B. Hinckley testified that he was paid for the overtime he recorded on his timecard. (Affidavit of Christopher F. Huntley ("Huntley Aff.") (Docket No. 79) Ex. 46 (Deposition of Michael B. Hinckley ("Hinckley Depo.") at 112:5-7).) Thus Mr. Hinckley could not have had his timecards altered if he received payment for his recorded overtime. Plaintiffs have offered no evidence and put forth nothing in the record to claim that Mr. Hinckley had his timecard altered in order to reduce overtime compensation. (*See* SOF ¶ 6 (identifying only Michael Moser, Kimberley Smith and Ryan Keen as those in the class who have had their timecards altered).)

3. Jacqueline T. Hladun

Jacqueline T. Hladun was employed in Roseville, Minnesota. (Huntley Aff. Ex. 47 (Deposition of Jacqueline T. Hladun ("Hladun Depo.") at 17:22-18:4, 35:20-23, 91:13-92:8).) Plaintiffs make no allegations and offer no evidence that Ms. Hladun had her timecard altered in order to reduce overtime compensation. (*See* Second Amended Complaint ¶¶ 2, 3, 44.) Ms. Hladun admits that she did not fill out her own timecards. (Affidavit of Nicole C. Hancock in Support of MEI's Motion for Partial Summary Judgment re Plaintiffs' Claims of Altering Employees' Timecards (Filed Under Seal) ("Hancock Aff.") Ex. L (Hladun Depo. (Vol. II) at 13:16-14:8).) Rather, Ms. Hladun's supervisors filled out her timecard. (*Id.*) Ms. Hladun cannot claim that her supervisors or managers *altered* her timecard if she never recorded any time on her timecard for the supervisors or managers to alter. Ms. Hladun is at most claiming that her time was not accurately recorded, which is not "alteration." Ms. Hladun's nonrecorded-

overtime claim is covered by the remaining allegation that MEI permitted employees to work without recording their overtime hours. (*See generally* Second Amended Complaint.)

4. Marilyn J. Craig

Marilyn J. Craig also worked in Minnesota. (Huntley Aff. Ex. 45 (Deposition of Marilyn J. Craig ("Craig Depo.") at 31:10-25:4.) Ms. Craig testified that her supervisor never said that MEI would alter timecards, but that "[i]t appeared" as if she was being paid less than the number of hours she actually worked. (*Id.* at 101:1-14.) Ms. Craig offers no further description of the alleged alteration, and Plaintiffs offer no evidence or proof that Ms. Craig had her timecard altered in order to reduce overtime compensation.

At Ms. Craig's second deposition, she first stated that she was paid for all of the overtime that she recorded. (Hancock Aff. Ex. E (Craig Depo. (Vol. II)) at 33:25-34:12.) However, later in her deposition, she claimed that on many instances she recorded time and then her time sheet was changed to reduce her hours. (*Id.* at 45:15-46:7.) When probed into the specifics about these alleged changes to her timecard, Ms. Craig could not remember any facts surrounding the changes. (*Id.*) Ms. Craig did not document the actual number of hours she worked; rather, it was "[j]ust in [her] head." (*Id.* at 47:23-48:2.)

5. Jeffery P. Clevenger

Jeffery P. Clevenger does not claim that he has experienced or witnessed timecard alterations. Indeed, he testified that he was not aware, and had no reason to believe, that either of his two supervisors ever altered his timecard for the purpose of diminishing the amount of overtime he worked. (Huntley Aff. Ex. 44 (Deposition of Jeffery Clevenger ("Clevenger Depo.")) at 166:19-167:1 ("I'm not aware of anyone [altering timecards]").)

6. Timothy C. Kaufmann

Timothy C. Kaufmann does not claim that he has experienced or witnessed timecard alterations. He testified that there was only one instance when his timecard had to be changed and that he was not sure whether he changed it himself or his supervisor changed it. (Hancock Aff. Ex. O (Deposition of Timothy C. Kaufmann (Vol. II) ("Kaufmann Depo.") at 15:1-11.) When asked whether he had any knowledge of any facts that would support an allegation that managers and supervisors altered timecards, Mr. Kaufmann said, "No." (*Id.* at 24:1-8.)

7. Other Claimants

In addition to the representatives' unsupported alteration accusations, MEI has searched the record to locate any other suggestions of timecard alterations. Of the few claimants even hinting about timecard alterations, not one could provide any evidence, proof or factual data to support a claim for timecard alteration. (*See* SOF ¶ 9.) As discussed in Section IV, to survive summary judgment, claimants must provide factual data to support their assertions. *See Marks v. United States (Dept of Justice)*, 578 F.2d 261, 263 (9th Cir. 1978) ("Conclusory allegations *unsupported by factual data* will not create a triable issue of fact." (emphasis added)). Claimants' bare unsupported accusations cannot meet their burden.

a. Rickey Ferrara

Rickey Ferrara testified at his deposition that the hours he submitted never matched what was ultimately shown on his timecard. (Hancock Aff. Ex. G (Deposition of Rickey Ferrara at 28:11-19).) Mr. Ferrara also stated that he meticulously kept a handwritten record of all of his hours in his Day Timer. (*Id.* at 19:9-13.) After Mr. Ferrara received his paycheck, he would confront his supervisor about not receiving the correct number of hours and his supervisor would

provide an explanation and Mr. Ferrara would "shut [his] mouth and walk away." (*Id.* at 19:16-20:25, 21:20-22:9.) Mr. Ferrara cannot estimate the number of hours that were taken from his timecard submissions (*id.* at 30:5-7), and he does not know how often or when any of the alleged alterations occurred (*id.* at 21:20-22:9). Thus Mr. Ferrara has no evidence of timecard alterations and cannot provide any factual data to support his allegation.

b. Ryan Keen and Michael Moser

Plaintiffs claim that Ryan Keen and Michael Moser had their timecards altered. (SOF ¶ 6.) Mr. Keen's sworn deposition testimony actually reveals that he testified: "I'm not sure." (Huntley Aff. Ex. 48 (Deposition of Ryan L. Keen ("Keen Depo.") at 110:14-16); *see also id.* at 212:4-10 (noting that he was "suspicious" about whether his time was changed).) Mr. Keen does not remember the time period in which he recorded more hours than he was paid. (*Id.* at 111:6-13.) Indeed, Mr. Keen admits that at the time, he did not notice that his timecard was altered. (*Id.* at 113:8-20.) It was not until after the lawsuit was filed that Mr. Keen noticed that his hours looked lower than the amount he actually recorded. (*Id.* at 110:22-111:2.)

Mr. Keen further testified that he had no knowledge of any practice or policy to alter time records to reduce wage and overtime claims. (*Id.* at 180:2-8.) Mr. Keen further admits (aside from what he believes are unknown problems with the calculation of his commissions) that MEI has paid him all wages due and owing and that MEI is not obligated to pay him any additional wages. (*Id.* at 190:9-25, 194:16-195:2.) Missing again is any factual data to support the conclusory allegations made by Plaintiffs about what they generally think Mr. Keen might say, which is also insufficient to survive summary judgment.

Mr. Moser specifically recalled only one occasion on which he believed his overtime was reduced by a couple of hours. (Huntley Aff. Ex. 52 (Deposition of Michael D. Moser ("Moser Depo.") at 53:11-55:2, 118:7-22).) Mr. Moser never talked to his supervisor about the alteration, and he has no idea why his timecard was altered. (*Id.* at 54:14-55:2.) Mr. Moser does not know the factual data surrounding the alleged alteration and thus cannot provide any factual data to support an alteration claim. *See Marks*, 578 F.2d at 263.

C. Employees Without Knowledge of Alterations

Nearly all of the former employees deposed admit that they have no knowledge of any timecard alteration. Fourteen inside sales representatives from the putative class attested to the following statement: "I . . . understood that the policies of Micron Electronics and [MCCS, MPC and MGCS] prohibited employees from altering, falsifying or tampering with time records. I am not aware of any of my supervisors or anyone else in management improperly altering or changing the time I submitted for the purpose of reducing the amount of work time or overtime I recorded." (SOF ¶ 8.)

Additional opt-in claimants consistently admit at their depositions that they have no knowledge of any improper timecard alterations. (*See* SOF ¶ 9.)

Inside sales representatives attest that they have no knowledge and are not aware of any supervisors or managers altering timecards in order to reduce overtime compensation. (SOF ¶¶ 8, 9.)

Former managerial employees of MEI corroborate the fact that no alterations to timecards occurred in order to reduce overtime compensation. (*See* SOF ¶¶ 10, 11.)

Of those employees who suggest their timecards may have been improperly altered, not one of them offers any factual data or evidence to support his or her claim. Plaintiffs' conclusory allegations, unsupported by any factual data or evidence, are simply insufficient to survive summary judgment.

IV. STANDARD OF REVIEW

On a motion for summary judgment, the movant bears the initial burden of identifying for the court those portions of the record that it believes demonstrate the absence of dispute as to any material fact. *Celotex*, 477 U.S. at 323. To defeat summary judgment, the nonmoving party "may not rest upon the mere allegations or denials of [its] pleading, but [its] response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial." Fed R. Civ. P. 56(e). "Conclusory allegations *unsupported by factual data* will not create triable issue of fact." *Marks*, 578 F.2d at 263 (emphasis added).

V. ARGUMENT

A. Alteration Allegations Are Unsupported by Factual Data

Plaintiffs claim that MEI violated the FLSA by improperly altering employee timecards. (SOF ¶ 6.) However, Plaintiffs fail to offer any factual data, evidence or proof to support these alteration claims.

Plaintiffs identify Ms. Smith, Mr. Keen and Mr. Moser as suffering as a result of the alleged alterations, citing their respective affidavits in support of their allegations. (*Id.*) Notably missing from these affidavits and subsequent discovery is any factual data or proof to support Plaintiffs' conclusory allegations.

1. No Factual Data to Support Ms. Smith's Allegations

Ms. Smith attested that "[o]ne [*sic*] Two [*sic*] occasions I determined that my supervisor, Jaime Nava, altered my Timesheet [*sic*] without my prior knowledge or consent. I confronted Mr [*sic*] Nava and he admitted the [*sic*] reducing my hours and said that as my supervisor he was entitled to adjust my timesheet as he saw appropriate." (Thomas Aff. Ex. 13 (Smith Aff.) ¶ 12.) However, Ms. Smith cannot remember any specific dates when the alleged alteration occurred. (Second Tollefson Aff. Ex. M (Smith Depo. at 408:23-409:8).) In fact, Ms. Smith cannot provide specifics, because she cannot remember herself the details surrounding the alleged alteration. (*Id.* at 410:1-7.) Ms. Smith stated that her supervisor may have changed her timecard to reflect that she was tardy in arriving to work. (*Id.* at 410:24-411:13.) She is not even sure whether the alteration took away time or gave her additional time. (*Id.* at 411:14-21.) Thus Ms. Smith asserts a conclusory allegation and cannot provide any factual data to support this allegation.

2. No Factual Data to Support Mr. Moser's Allegations

Mr. Moser specifically recalled only one occasion in which he believed his overtime was reduced by a couple of hours. (Huntley Aff. Ex. 52 (Moser Depo. at 53:11-55:2, 118:7-22).) Mr. Moser never talked to his supervisor about the supposed alteration, and he has no idea why his timecard was altered. (*Id.* at 54:14-55:2.) Mr. Moser simply offers no factual data that his timecard was altered, which is necessary for Plaintiffs to survive summary judgment. *See Marks*, 578 F.2d at 263.

3. No Factual Data to Support Mr. Keen's Allegations

Finally, Plaintiffs' Brief in Support of Motion for Conditional Certification (Docket No. 76) (at 16) asserts that Mr. Keen suffered timecard alterations that reduced his overtime compensation. However, Mr. Keen's sworn deposition testimony actually reveals that he testified: "I'm not sure." (Huntley Aff. Ex. 48 (Keen Depo. at 110:14-16); *see also id.* at 212:4-10 (noting that he was "suspicious" about whether his time was changed).)

Mr. Keen testified that he had no knowledge of any practice or policy to alter time records to reduce wage and overtime claims. (*Id.* at 180:2-8.) Mr. Keen further admits (aside from what he believes are unknown problems with the calculation of his commissions) that MEI has paid him all wages due and owing to him and that MEI is not obligated to pay him any additional wages. (*Id.* at 190:9-25, 194:16-195:2.) Missing again is any factual data to support the conclusory allegations made by Plaintiffs regarding what they generally think Mr. Keen might say, which is insufficient to survive summary judgment. *See Marks*, 578 F.2d at 263.

B. Plaintiffs Cannot Meet Their Burden of Proof to Show That Timecard Alterations Occurred on a Classwide Basis

Plaintiffs simply do not have admissible facts or evidence to uphold their bare allegation that supervisors altered their timecards in order to reduce overtime compensation. Plaintiffs have the burden of proof to establish a prima facie FLSA violation. *See Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 687 (1946). To satisfy this burden, Plaintiffs must create a reasonable inference that supervisors altered timecards regularly and on a classwide basis. *Id.* Simply stating that one "know[s] of occasions" or is "suspicious," rather than specifying any actual instances or evidence of the alterations, is not sufficient to support the alteration allegations. *Id.*

By admission and omission, it is clear that timecard alterations were neither common nor typical class experiences. Class representative Mr. Clevenger is not aware of anyone having his or her timecard altered to reduce overtime compensation. (Huntley Aff. Ex. 44 (Clevenger Depo. at 166:19-167:1).) Class representative Mr. Hinckley did not have his timecard altered and admits to being paid for all of the time he recorded on his timecard. (Huntley Aff. Ex. 46 (Hinckley Depo. at 112:5-7).)

Inside sales representatives Rudeena E. Ballantyne, Douglas V. Eason, Miguel A. Flores, Brian A. Friel, Benjamin K. Jenkins, Niklas F. Kopp, Stephen E. Laats, James Ryan Miller, Jeremy Todd Points, Clint J. Pulsipher, Jason W. Salisbury, Brenton E. Schiefelbein, Sandra K. Wolfe and Chaun J. Stone all attest to the fact that they have no knowledge of or experiences regarding supervisors altering timecards. (SOF ¶ 8.)

Inside sales representatives Ken Ford, Mathew Jarame Ell, Laura Anderson, Carren Mattson, Lauric (Paine) McGeorge, Linda Lee, Rory Kip DeRouen, Dale Hope, Eric Fillmore, Kevin Henderson, Jared Hodges, Mr. Kaufmann, David Allen Thom, Michelle Saari, Matt Hagman and David Kestner all testified that they had no knowledge of facts regarding timecard alterations. (SOF ¶ 9.)

Supervisors of the class claimants, including Mark Auchampach, Kimberly Boschee, William Brakeman, Dominic Casey, Larry Chase, Jay Church, Mark Cox, Jay Ellis, David Groeger, David McCauley, Mr. Nava and Anthony Robinson, also swear under oath that they did not alter timecards in order to reduce overtime compensation. (SOF ¶ 10.)

Paragraph 52(A) through (H) of the Second Amended Complaint provides an enumerated list of "questions of law and fact common to the class." (Second Amended Complaint ¶ 52.)

Not one of the enumerated "common" items claims that the class members experienced alterations to their timecards. Plaintiffs simply omit any allegation that the class suffered timecard alterations. Plaintiffs also allege that the class suffered an enumerated list of violations under the FLSA. (*Id.* ¶ 62.) However, Plaintiffs again omit any allegation that MEI violated the FLSA by altering the class's timecards. Plaintiffs simply fail to make a classwide allegation of alteration.

Even if seven of the 91 class members experienced timecard alterations, these attestations are not sufficiently common or typical to litigate this issue on a classwide basis.[6] Plaintiffs cannot use representative testimony if it differs from the experiences of the class. *See* 29 U.S.C. § 216(b) (requiring that representatives be similarly situated to be certified as class). Accordingly, Plaintiffs cannot maintain a classwide claim under the FLSA based on the unsubstantiated allegations of a few class representatives that allegedly suffered timecard alterations when the record plainly reveals that the class did not commonly or typically suffer any unlawful timecard alterations.

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[6] The FLSA requires that class members be "similarly situated." 29 U.S.C. § 216(b) (West 1998). Although the FLSA does not define "similarly situated," and the Ninth Circuit has not yet articulated a standard for this term, courts considering the issue have concluded that to meet this burden, plaintiffs must demonstrate "similarity among the individual situations" and provide a "factual nexus which binds the named plaintiffs and the potential class members together as victims of a particular alleged policy or practice." *Bonilla v. Las Vegas Cigar Co.*, 61 F. Supp. 2d 1129, 1138 n.6 (D. Nev. 1999) (quoting *Crain v. Helmerich & Payne Int'l Drilling Co.*, 30 Wage & Hour Cas. (BNA) 1452 (E.D. La. 1992) (quotation marks, citation and brackets omitted)); *see also Hoffmann v. Sbarro, Inc.*, 982 F. Supp. 249, 261 (S.D.N.Y. 1997) (defining similarly situated as "potential plaintiffs [who] together were victims of a common policy or plan that violated the law"). Because Plaintiffs fail to provide any evidence that they all similarly suffered as a result of unlawful alterations to their timecards, they should be precluded from litigating this issue on a classwide basis.

C. Plaintiffs' Accusations Are Insufficient to Create an Issue of Material Fact

Plaintiffs offer hollow attestations and conclusory allegations to support their assertions that supervisors and managers improperly altered their timecards. However, conclusory allegations that are not supported with factual data cannot survive summary judgment. *See Marks*, 578 F.2d at 263. As set forth in Federal Rule of Civil Procedure 56, "mere allegations or denials" do not meet the opposing party's burden of showing a genuine issue of material fact. *Gasaway v. Northwestern Mutual Life Insurance Company*, 26 F.3d 957, 960 (9th Cir. 1994). A genuine issue of material fact cannot be created by making an assertion in legal memoranda. *S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines) v. Walter Kidde & Co.*, 690 F.2d 1235, 1238 (9th Cir. 1982); *see also*, *Hansen v. United States*, 7 F.3d 137, 138 (9th Cir. 1993) (holding that affidavits with conclusory allegations unsupported by factual data do not create issue of material fact); *Marks* 578 F.2d at 263 (stating that conclusory allegations without supporting factual data will not create triable issue of fact); *see also Taylor v. List*, 880 F.2d 1040, 1045 (9th Cir. 1989).

Ms. Smith attests that her supervisors altered her timecard without first obtaining her consent. (Thomas Aff. Ex. 13 (Smith Aff. ¶ 12).) When she confronted her supervisor, he told her that he was entitled to alter her timecard as he saw appropriate. (*Id.*) Nothing in Ms. Smith's attestation alleges unlawful conduct on MEI's behalf. Ms. Smith's supervisor is permitted and even required to alter her timecard in order to reflect the actual hours Ms. Smith worked. *See infra* (Subsection V.D.) Further, Ms. Smith provides no factual data to support her allegations. She offers no dates on which the alleged alteration occurred. She offers no calculation of hours that were reduced on her timecard. She offers no proof that she worked overtime on any day for

which she was not paid. She offers no evidence whatsoever. Ms. Smith's attestation does not create a reasonable inference of timecard alterations. *See Marks*, 578 F.2d at 263.

Mr. Moser "believes" his overtime was reduced by a couple of hours. (Huntley Aff. Ex. 52 (Moser Depo. at 53:11-55:2, 118:7-22).) However, he never inquired into why he was deprived of these hours. (*Id.*) He simply does not know if it was a mistake or an intentional overtime reduction. Moreover, he also failed to provide any factual data to support his allegations. He does not explain when the reduction occurred. This is not sufficient factual detail to survive summary judgment. *See Marks*, 578 F.2d at 263.

Mr. Keen claims that he suffered from alterations to his timecard. (Huntley Aff. Ex. 48 (Keen Depo. at 211:7-212:10).) Yet he testified that he was not sure that his timecard was altered. (*Id.*) He offered no factual details to support his allegation, such as when the alteration occurred and whether there was an inquiry made to explain the alteration. Finally, and in direct contravention of a timecard alteration claim, Mr. Keen admits that other than commissions, MEI has paid him all of the compensation he is owed. (*Id.* at 190:9-25.) *See Marks*, 578 F.2d at 263.

In sum, not one of the Plaintiff representatives or class members has offered any factual data to support his or her very serious claims of timecard alterations. Because conclusory allegations that are unsupported by factual data are insufficient to give rise to an issue of material fact, this issue is fit to be disposed of on summary judgment. *See Marks*, 578 F.2d at 263.

D. Any Alterations Were Proper and Required by the FLSA

Employers have a duty to correct time records that are inaccurate and do not accurately reflect the actual time worked by the employee. *See e.g.*, 29 C.F.R. § 785.48 (requiring that if employer knows that employee's timecard reflects that employee worked time when in fact

employee was not present or left work early, employer must correct the timecard to reflect actual time worked by that employee).

At MEI, the Me@micronpc.com system automatically defaulted to a 40-hour workweek. (SOF ¶ 3.) Thus, if the employee and the employer did not make any changes to the timecard, the timecard would reflect that the employee worked 40 hours. (*Id.*) Occasionally, supervisors had to correct automatically generated timecards to reflect hours that sales representatives actually worked. (*Id.*) Such an occasion would arise when an inside sales representative was absent from work and could not correct the timecard him- or herself. MEI had not only a right, but was required, to correct the timecard to reflect the actual time worked. *See* 29 C.F.R. § 785.48.

The only admissible evidence of record in this case shows that any alterations occurred to correct and accurately reflect *actual* time worked. (SOF ¶ 11.) Mr. Nava provided a timesheet adjustment form he used to change Ms. Smith's timecard when she was out of town for a funeral. (Affidavit of Jaime Nava (Docket No. 117) ¶ 11.) This is the *only* physical evidence offered for timecard alterations, and it shows a proper and lawful timecard adjustment. As Ms. Smith's employer, MEI had a duty to correct her timecard to reflect the actual number of hours she worked. *See* 29 C.F.R. § 785.48.

Thus the only evidence before the Court as it relates to timecard alterations shows that the alteration was lawful.

VI. CONCLUSION

Notwithstanding extensive discovery, Plaintiffs have provided absolutely no evidence or proof to support their very serious allegations of timecard alterations. At best, Plaintiffs have

offered conclusory statements unsupported by any factual detail, which are insufficient to survive summary judgment.

The evidence of record reflects that the class as a whole, typically and commonly, admits that it has no knowledge of timecard alterations. The evidence also reflects that any alterations were permissible and required under the FLSA. Accordingly, MEI respectfully requests that the Court grant partial summary judgment to the extent that the Plaintiffs' Second Amended Complaint alleges any claims of improper timecard alterations by supervisors and managers.

Dated this 21st day of June, 2004.

STOEL RIVES LLP

Kim J Dockstader
Attorneys for Defendant Micron Electronics, Inc.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 21st day of June, 2004, I caused to be served a true copy of the foregoing **MEMORANDUM IN SUPPORT OF MICRON ELECTRONICS, INC.'S MOTION FOR PARTIAL SUMMARY JUDGMENT RE PLAINTIFFS' CLAIMS OF ALTERING EMPLOYEES' TIMECARDS** by the method indicated below, addressed to the following:

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